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**In The  
Supreme Court of the United States  
October Term, 1991**

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**DERRICK MORGAN,**

*Appellant,*

*vs.*

**PEOPLE OF THE STATE OF ILLINOIS,**

*Appellee.*

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ON APPEAL FROM THE ILLINOIS SUPREME COURT

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**BRIEF OF AMICI CURIAE  
THE AMERICAN CIVIL LIBERTIES UNION  
THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS  
IN SUPPORT OF APPELLANT**

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No. 91-5118

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**INTEREST OF AMICI CURIAE\***

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The American Civil Liberties Union is a nationwide, nonpartisan organization with nearly 300,000 members. The ACLU of Illinois is one of its state affiliates. Amici are dedicated to the principles embodied in the Bill of Rights including the ban on cruel and unusual punishment and the guarantee of due process of law in criminal proceedings. Because of the irreversibility of the death penalty, the government's duty to provide fair procedures, including an impartial jury, is preeminent in capital cases. Reflecting its longstanding concerns with the death penalty, the ACLU created a Capital Punishment Project in 1975 to work exclusively on death penalty issues and to ensure, at

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\* Pursuant to United States Supreme Court Rule 37.3, the ACLU and the ACLU of Illinois have obtained the written consents of all parties, which accompany this brief.



the very least, that procedures for imposing the death penalty are fair and evenhanded. The ACLU has participated in numerous death penalty and jury selection cases before this Court, including *Witherspoon v. Illinois*, 391 U.S. 510 (1968) and *Batson v. Kentucky*, 476 U.S. 79 (1986).

### SUMMARY OF THE ARGUMENT

In this capital case, the Illinois Supreme Court upheld the trial court's refusal to question defendant Derrick Morgan's jury to determine whether any of its members would automatically sentence him to death, upon a finding of guilt, regardless of instructions by the Court. In upholding the trial court's ruling, the Illinois Supreme Court denied Derrick Morgan a fair trial by foreclosing any meaningful opportunity to protect his Sixth Amendment right to an impartial jury. The opportunity to protect substantive rights is at the core of our principles of ordered liberty. Here, however, the Illinois Supreme Court denied due process of law in its primary sense — process which provides the opportunity to protect a fundamental constitutional right.

In *Ross v. Oklahoma*, 487 U.S. 81 (1988), this Court established that a defendant in a capital case has the right to a jury panel free from members who would automatically impose a sentence of death. Although Derrick Morgan had this right, the only way he could enforce it was to have his attorney or the court question the jurors on this issue. In this case, Derrick Morgan's counsel attempted to protect this right. He proposed that the trial court ask prospective jurors: "If you found Derrick Morgan guilty would you automatically vote to impose the death penalty no matter what the facts are?" *People v. Morgan*, 568 N.E.2d 755, 778 (Ill. 1991). However, the trial court refused to make that inquiry.

On direct appeal from his conviction, Derrick Morgan asserted that he had been denied an impartial jury on this precise ground. In an alarming denial of procedural fairness, the Illinois Supreme Court rejected the appeal. The Illinois Supreme Court upheld the refusal to permit questioning, while at the same time ruling that Derrick Morgan had made no showing that any actual juror would automatically impose the death penalty. *Id.* The practical effect of this decision was to hold that Derrick Morgan had a constitutional right with no means to exercise it.

Thus, the decision of the Illinois Supreme Court paid lip service to the right to a jury composed of jurors who will not

automatically impose the death penalty, while rendering that constitutional right an empty promise. The Illinois Supreme Court placed on Derrick Morgan a burden of proof that the trial court prevented him from meeting. This Kafkaesque interpretation of the Sixth Amendment cannot be condoned.

The Illinois Supreme Court's decision is particularly unjust in this capital case, the quintessential case in which maximum process is due. Derrick Morgan's life cannot be taken by the State of Illinois until and unless he is afforded the right to seek a jury panel free from members who would automatically impose a sentence of death.

### ARGUMENT

#### I.

#### MORGAN HAS A RIGHT TO A TRIAL BY JURORS WHO WOULD NOT AUTOMATICALLY SENTENCE HIM TO DEATH UPON A FINDING OF GUILT.

During the *voir dire* in *Ross v. Oklahoma*, a prospective juror named Darrell Huling "declared that if the jury found petitioner guilty, he would vote to impose death automatically." *Ross v. Oklahoma*, 487 U.S. at 84. Defense counsel moved to have Huling removed for cause, and when the trial court denied that motion, the defense exercised a peremptory challenge to remove Huling. On appeal before this Court, the defendant contended that the trial court's failure to remove Huling for cause violated the Sixth and Fourteenth Amendments. The defendant's conviction was upheld only because Huling did not sit on the jury.

Chief Justice Rehnquist expressed the view of the Court that an automatic death penalty juror such as Huling cannot sit on a capital sentencing jury, for "the sentence would have to be overturned." *Id.* at 85. As Chief Justice Rehnquist specifically stated:

Had Huling sat on the jury that ultimately sentenced petitioner to death, and had petitioner properly preserved his right to challenge the trial court's failure to remove Huling for cause, the sentence would have to be overturned.

*Id.* As Chief Justice Rehnquist explained, "[i]t is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury." *Id.*

This Court's decision in *Ross v. Oklahoma* is consistent with an established line of cases holding that the Constitution protects capital defendants from jurors whose views on capital punishment would prevent them from conscientiously applying the law and finding the facts. In *Adams v. Texas*, 448 U.S. 38, 45 (1980), and again in *Wainwright v. Witt*, 469 U.S. 412, 424 (1985), this Court recognized that a prospective juror whose views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" may be excluded for cause. See also *Lockett v. Ohio*, 438 U.S. 586, 595-96 (1978) (excluding jurors whose views on capital punishment would prevent them from abiding by the law and following the instructions of the trial judge).

An automatic death penalty juror is by definition one who cannot perform his duties in accordance with his instructions and his oath; an automatic death penalty juror would sentence a defendant to death regardless of the law or the facts. Under *Ross v. Oklahoma*, the Sixth Amendment right to an unbiased jury means that no juror in a capital case can be an automatic death penalty juror.<sup>1</sup>

<sup>1</sup> Indeed, no state court has held that defendants may be denied their right to a jury free from jurors who would automatically impose death upon a finding of guilt. To the contrary, every state that has considered the issue has recognized a defendant's right to exclude prospective jurors whose bias toward the death penalty would prevent them from observing their oaths. See *Bracewell v. State*, 506 So.2d 354, 358 (Ala. Crim. App. 1986); *Pickens v. State*, 730 S.W.2d 230, 234 (Ark.), cert. denied, 484 U.S. 917 (1987); *People v. Coleman*, 759 P.2d 1260, 1270 (Cal. 1988), cert. denied, 489 U.S. 110 (1989), post conviction relief granted, 771 F. Supp. 300 (N.D. Cal. 1991); *DeShields v. State*, 534 A.2d 630, 634-36 (Del. 1987), cert. denied, 486 U.S. 1017 (1988); *O'Connell v. State*, 480 So.2d 1284, 1287 (Fla. 1985); *Skipper v. State*, 364 S.E.2d 835, 839 (Ga. 1988); *Morris v. Commonwealth*, 766 S.W.2d 58, 60 (Ky. 1989); *State v. Albert*, 414 So.2d 680, 682 (La. 1982); *Hunt v. State*, 583 A.2d 218, 231 (Md. Ct. App. 1990); *Kenley v. State*, 759 S.W.2d 340, 352 (Mo. Ct. App. 1988); *Thompson v. State*, 721 P.2d 1290, 1291 (Nev. 1986); *State v. Williams*, 550 A.2d 1172, 1182-83 (N.J. 1988); *State v. Quick*, 405 S.E.2d 179, 190 (N.C. 1991); *State v. Tyler*, 553 N.E.2d 576, 587 (Ohio), cert. denied, 111 S. Ct. 371 (1990); *Boltz v. State*, 806 P.2d 1117, 1122 (Okla.), cert. denied, 112 S. Ct. 143 (1991); *State v. Wagner*, 752 P.2d 1136, 1174 (Or. 1988), cert. granted and judgment vacated on other grounds, 492 U.S. 914 (1989); *State v. Bell*, 393 S.E.2d 364, 368 (S.C.), cert. denied, 111 S. Ct. 227 (1990); *State v. Bates*, 804 S.W.2d 868, 878 (Tenn.), cert. denied, 112 S. Ct. 131 (1991); *Cumbo v. State*, 760 S.W.2d 251, 256 (Tex. Crim. 1988); *State v. Norton*, 675 P.2d 577, 589 (Utah 1983), cert. denied, 466 U.S. 942 (1984); *Patterson v. Commonwealth*, 283 S.E.2d 212, 216 (Va. 1981); and *State v. Hughes*, 721 P.2d 902, 905 (Wash. 1986).

## II.

### THE SIXTH AND FOURTEENTH AMENDMENTS REQUIRE THAT MORGAN BE AFFORDED PROCEDURAL FAIRNESS AND AN OPPORTUNITY TO DEFEND HIS RIGHTS TO AN IMPARTIAL JURY.

Derrick Morgan sought to invoke his right to an impartial jury when his counsel proposed that the trial court ask prospective jurors if they would automatically sentence him to death if he were found guilty. However, the trial court and ultimately the Illinois Supreme Court denied him that right and thereby violated his constitutional rights to procedural fairness and due process of law.

At the very least, the Sixth and Fourteenth Amendments ensure every accused person a fair trial and an opportunity to exercise his rights. When a state court's procedures foreclose any opportunity to enforce a right, the state renders that right a nullity and violates due process of law. See, e.g., *Lankford v. Idaho*, \_\_\_ U.S. \_\_\_, 111 S. Ct. 1723, 1733 (1991); *Reece v. Georgia*, 350 U.S. 85, 89-90 (1955); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678, 682 (1930).

#### A. This Court Has Long Recognized that Due Process of Law Guarantees Procedural Fairness at Trial.

In 1915, Justice Holmes recognized that procedural fairness at trial is the essence of the constitutional guarantee of due process of law: "Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard." *Frank v. Mangum*, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting).

Later opinions of the Court reiterate Holmes' view that, at the very least, due process of law must ensure procedural fairness at trial. See, e.g., *Shaughnessy v. Mezei*, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting) ("Procedural fairness, if not all that originally was meant by due process of law, is at least what it uncompromisingly requires."); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring) ("Fairness of procedure is 'due process in the primary sense'") (quoting *Brinkerhoff-Faris*, 281 U.S. at 681).



Procedural fairness is entwined in the development and history of our liberty. Justices Brandeis and Frankfurter eloquently explained that liberty consists of procedural regularity and procedural safeguards: "[I]n the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play." *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting). See also *McNabb v. United States*, 318 U.S. 332, 347 (1943) (Frankfurter, J.) ("The history of liberty has largely been the history of observance of procedural safeguards.").

The Illinois Supreme Court disregarded these principles and denied Derrick Morgan basic procedural fairness. Its decision offends any sense of fair play. The Illinois Supreme Court held that Derrick Morgan had to show that a juror was actually biased, noting that "no juror expressed any views that would call his or her impartiality into question." *Morgan*, 568 N.E.2d at 778. At the same time, and inconsistently, the Court upheld the trial court's refusal to permit Derrick Morgan's attorney to make the inquiry necessary to establish bias.

This is more than a procedural glitch. The need to question a prospective juror on his views on the death penalty is demonstrated by the facts in *Ross v. Oklahoma*, where the juror Huling "initially indicated that he could vote to recommend a life sentence if the circumstances were appropriate." It was only "on further examination of defense counsel . . . [that] he [indicated] he would vote to impose death automatically." *Ross v. Oklahoma*, 487 U.S. at 83-84; see also *Wainwright v. Witt*, 469 U.S. at 425-26 (many jurors come to court unsure of their views; hence the need for inquiry).

Nevertheless, the State claims that Derrick Morgan's right to an impartial jury was satisfied because each juror swore to uphold the law. As *Ross v. Oklahoma* demonstrates, the juror's oath alone is not sufficient, just as a witness' oath alone is not sufficient. A witness must be subject to cross-examination and a prospective juror must be subject to questioning.

Moreover, the State's assertion that a general fairness inquiry is sufficient is directly contradicted by the State's exercise of the right to question the jury on this very topic. The State itself asked prospective jurors in this case specific questions about their views on the death penalty, and struck from the panel each juror

who was so opposed to the death penalty that he could not impose that sentence under any circumstances. The State cannot now legitimately claim that specific questioning was not necessary to assure Derrick Morgan an impartial jury.

By dismissing Derrick Morgan's appeal only because he failed to show certain facts — while at the same time upholding the ruling that prevented him from establishing those facts — the decision below defies basic notions of fairness. Many state courts have recognized that a defendant's right to a jury free from automatic death penalty jurors is meaningless unless he can ask prospective jurors if they are so biased. *People v. Bittaker*, 774 P.2d 659, 679 (Cal. 1989) ("In order to intelligently exercise the right to challenge for cause, defendant's counsel must be accorded a reasonable opportunity to lay a foundation for the challenge by questioning the prospective jurors on *voir dire* to learn whether any entertain a fixed opinion [in favor of the death penalty in all circumstances]" (citation omitted)), *cert. denied*, 110 S. Ct. 2632 (1990); *Skipper v. State*, 364 S.E.2d 835, 839 (Ga. 1988) (the trial court's improper limitation on *voir dire* "deprived the defendant of an opportunity to determine whether prospective jurors were impartial on the question of sentence"); *State v. Wilson*, 330 S.E.2d 450, 458 (N.C. 1985) ("[B]oth the defendant and the State have the right to question prospective jurors as to their views concerning capital punishment in order to ensure a fair and impartial verdict."); *Patterson v. Commonwealth*, 283 S.E.2d 212, 216 (Va. 1981) (by failing to ask potential jurors whether they believed the death penalty was a proper sentence in every murder case, the trial court "failed . . . to preserve fully the defendant's right to a fair and impartial jury").<sup>2</sup>

The Illinois Supreme Court deprived Derrick Morgan of procedural fairness and violated his Sixth and Fourteenth Amendment rights to a fair trial and due process of law.

<sup>2</sup> *Accord Morris v. Commonwealth*, 766 S.W.2d 58, 60 (Ky. 1989); *State v. Williams*, 550 A.2d 1172, 1184 (N.J. 1988); *Bracewell v. State*, 506 So.2d 354, 358 (Ala. Crim. App. 1986); *Gore v. State*, 475 So.2d 1205, 1207 (Fla. 1985), *cert. denied*, 475 U.S. 1031 (1986); *State v. Norton*, 675 P.2d 577, 589 (Utah 1983), *cert. denied*, 466 U.S. 942 (1984). *Contra Riley v. State*, 585 A.2d 719, 725-26 (Del. 1990), *cert. denied*, 111 S. Ct. 2840 (1991); *State v. Hyman*, 281 S.E.2d 209, 211 (S.C. 1981), *cert. denied*, 458 U.S. 1122 (1982).

### B. A State Court May Not Deprive a Defendant of an Opportunity to Defend His Rights.

By depriving Derrick Morgan of any means to preserve or exercise his right to a jury free of automatic death penalty jurors, the Illinois Courts denied him due process of law. No state court may deny an individual an opportunity to defend his constitutional rights. *Reece v. Georgia*, 350 U.S. at 89 (due process violated where defendant had no chance to exercise his right to object to a grand jury — “the right to object to a grand jury presupposes an opportunity to exercise that right”); *In re Oliver*, 333 U.S. 257 (1948) (plaintiff was denied an opportunity to be heard, in violation of his due process rights, when Michigan judge summarily sent him to jail after questioning him in chambers).

Justice Brandeis’ opinion for the Court in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill* is especially instructive. In that case, the Missouri Supreme Court dismissed plaintiff’s equity case because the plaintiff purportedly had an adequate legal remedy before the state tax commission. However, six years earlier the Missouri Court had ruled that the state tax commission was without power to hear an identical case. The plaintiff sought relief before this Court. The issue was whether the plaintiff had been accorded “due process in the primary sense — whether it has had an opportunity to present its case and be heard in its support.” *Brinkerhoff-Faris*, 281 U.S. at 681.

This Court found that the plaintiff had not been accorded due process because the Missouri Supreme Court’s decision left the plaintiff with no means to exercise its rights — citing only an administrative remedy which had never in fact been available. *Id.* In powerful language that directly applies to Derrick Morgan’s case, Justice Brandeis concluded that no state may deprive a person “of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.” *Id.* at 682.

The Illinois Supreme Court improperly deprived Derrick Morgan of any real opportunity to protect his right to a jury free of partial jurors, a right established by this Court in *Ross v. Oklahoma*. Derrick Morgan never had a chance to exercise this right before trial, and was unable to preserve his challenge to the jury’s partiality for appeal. He is now entitled to a fair trial, in which that right can be exercised.

### C. The Constitutional Guarantees of Procedural Fairness and an Opportunity to Defend Constitutional Rights Are of Particularly Critical Importance in a Capital Case.

The Illinois Supreme Court’s judgment depriving Derrick Morgan of procedural fairness occurred when his life was at stake — when the utmost fairness was due. This Court has emphasized that the fair procedure guaranteed by the Fourteenth Amendment is crucial in capital cases. In *Lankford v. Idaho*, \_\_\_ U.S. \_\_\_, 111 S. Ct. 1723, 1732 (1991), the Court spoke of the “special importance of fair procedure in the capital sentencing context.” Indeed, this Court has recognized more than once the “vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason . . . .” *Id.* (quoting *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977)).

The decision of the Illinois Supreme Court does not meet the special test this Court imposes in capital cases. It cannot be said that the jury’s decision to impose the death penalty was clearly an unbiased decision. Nor can it be said that the Illinois Supreme Court’s decision was reasoned when its practical effect was to deny Derrick Morgan an opportunity to defend his right to an impartial jury.

Indeed, the Illinois Supreme Court has itself recognized the illogic of its decision. In *People v. Jackson*, 91-68012, slip op. at 31 (Ill. Sept. 26, 1991), while the Illinois Supreme Court affirmed its decision in *Morgan*, it recognized that the “best way to ensure that a prospective juror would not automatically vote for the death penalty is to ask,” apparently leaving this matter to the discretion of the trial judge. However, protection of constitutional rights is not discretionary, particularly in capital cases.



### CONCLUSION

The Illinois Supreme Court's judgment denied Derrick Morgan a fair trial and due process of law at its most basic level. In this capital case, Derrick Morgan had no opportunity to exercise or preserve his right to an impartial jury. The denial of any means to protect a constitutional right combined with the illogic of the Illinois Supreme Court's decision undermined the basic fairness of the procedure that resulted in the maximum legal penalty, the death sentence. The Court should reverse the decision of the Illinois Supreme Court.

Respectfully submitted,

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Counsel for the Amici, the AMERICAN  
CIVIL LIBERTIES UNION and the AMERICAN  
CIVIL LIBERTIES UNION OF ILLINOIS

November 27, 1991